In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1048

ROBERT CHEVOOR,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PAUL T. SMITH
JEFFREY M. SMITH
HARVEY R. PETERS
89 State Street
Boston, Massachusetts 02109
Attorneys for the Petitioner, Defendant.

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The petitioner, Robert Chevoor, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 3, 1975.

Opinions Below

The opinion of the district court, printed in Appendix A hereto, *infra*, p. 22, is reported at 392 F. Supp. 436. The opinion of the Court of appeals, printed in Appendix B hereto, *infra*, p. 37, has not yet been reported. The Memo-

randum and Order on Petition for Rehearing of the court of appeals, printed in Appendix C hereto, *infra*, p. 51, is not reported.

Jurisdiction

The judgment of the court of appeals was entered on December 3, 1975 (App. B, p. 37) and rehearing was denied on December 29, 1975 (App. C, p. 51). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I. Where the district court made findings of fact, which were supported by the evidence at the hearing on defendant's motion to dismiss, did the court of appeals err when it "substituted its own finding(s)" and implicitly "held that the trial judge's (Opinion and Order dismissing the indictment) amounted to an abuse of discretion" contrary to *United States* v. *Johnson*, 327 U.S. 106, 110-111?

II. Whether the district court's dismissal of the indictment in the exercise of "the court's supervisory powers over grand jury proceedings" was warranted, where the district court found (1) that "the Government's prime purpose" in bringing the defendant before the grand jury "was to obtain a perjury indictment" and (2) that the Government misled the defendant into believing that he had no right to assert his Fifth Amendment privilege before the grand jury?

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Statement of the Case

Prior Proceedings

On March 13, 1974 the defendant, Robert Chevoor, was indicted, pursuant to 18 U.S.C. § 1623, in a three count indictment charging him with having falsely testified before a grand jury which purported to be investigating alleged loan-sharking activities of one Michael Pellicci, among others. (R. 90-93).[1] In substance, the defendant was charged with having falsely testified: 1) that he did not owe Pellicci any money; 2) that he had not discussed payments due Pellicci with Pellicci; and 3) that he had not discussed with Pellicci that others owed money to Pellicci.

The defendant, having pleaded not guilty, moved to suppress his grand jury testimony and to dismiss the indictment pending against him, *inter alia*, on the ground that the defendant's testimony was obtained in violation of his privilege against self-incrimination and on the ground that the prosecutor brought the defendant before the grand jury not for the purpose of assisting the grand jury in its investigation but rather for the purpose of ensnaring the defendant by what the prosecutor believed would be perjurious testimony (R. 94-98).

On July 9, 1974 a hearing on defendant's motions was held before District Judge Joseph L. Tauro. At the hearing the defendant and two F.B.I. agents testified and the parties entered into a number of stipulations as to the facts (R. 99-250). In addition, the district court received

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[1] "R." refers to the Appendix to the briefs in the Court of Appeals.

in evidence some 14 exhibits including the transcripts of the defendant's grand jury testimony (R. 249-250). Although he was in effect invited to testify by the district court, (R. 134) the prosecutor failed to testify at the hearing; nor did he offer any direct evidence to controvert the district court's finding that he, the prosecutor, had intended to ensnare the defendant into committing perjury when he brought the defendant before the grand jury.

On March 21, 1975, District Judge Tauro, in a well reasoned and detailed Opinion (App. A, p. 22), concluded that the special circumstances of this case, where *inter alia*, "the Government prime purpose in putting him on the stand was to obtain a perjury indictment" (App. A, pp. 31-32) and where the Government misled the defendant into believing he had no right to assert his Fifth Amendment privilege before the grand jury (App. A, p. 28), required that the indictment be dismissed (App. A, p. 35).

Pursuant to 18 U.S.C. § 3731, the Government appealed from the district court's Opinion and Order dismissing the indictment (R. ii). The First Circuit rejected the district court's finding that the Government's prime purpose in bringing Chevoor before the grand jury "was to extract perjury for which to indict him" and reversed the judgment of the district court. (App. B, pp. 49-50).

Statement of Facts

The defendant, Robert Chevoor, a school teacher in the Town of Watertown, Massachusetts (R. 120-121, 251, 260), is alleged by the Government to be a loan-shark victim of one Michael Pellicci (R. 260).

For approximately a year prior to November 27, 1973 there was an intensive Government investigation into the activities of Pellicci and his associates (R. 100, 251). The Government was receiving information concerning Pellicci and his activities, including the whereabouts of his loan-

sharking and gaming records, from an Edward Vaughan, who was an undercover agent acting in the role of a corrupt policeman (R. 101), and from four unidentified informants (R. 101).

Thereafter, on November 27, 1973, the Government's application for an order authorizing the interception of wire and oral communications of Pellicci was allowed (R. 102, 251-252). In addition to certain wiretaps, the Government also was authorized to intercept oral communications from a so-called "Room A," which was Pellicci's private office at his place of business in Watertown (R. 102).

On December 9, 1973, the Government intercepted a conversation between Pellicci and the defendant at Pellicci's office, the so-called Room A (R. 103, 252). F.B.I. Agent Vaules overheard and recorded the 27 minute conversation in its entirety and it was subsequently transcribed (R. 1-22, 103, 106, 202, 252). It is this conversation which provided substantially the only basis for the questions put to the defendant before the grand jury and for the charges against him (R. 106, 254, 256).

Subsequently, on the evening of January 8, the defendant was served with a subpoena requiring him to appear on the following morning before a grand jury, and to "report to J. M. Friedman, Esq." (R. 23, 103-104, 121, 252-253).

Prior to being served with the subpoena or being told that he would have to appear before the grand jury, the defendant was questioned by Agent Vaules concerning his relationship with Pellicci (R. 137, 253). The defendant told the F.B.I. agents that he did not owe Pellicci any money and that he had not discussed loan-shark debts with Pellicci (R. 137, 231, 253). In effect, he made substantially the same statements that he subsequently made to Mr. Friedman and the grand jury and which resulted in the return of the indictment (R. 232, 253, 255).

The defendant's statements were "at least arguably in-

consistent" with the transcript of the intercepted December 9 conversation (R. 260). Accordingly, Agent Vaules believed that the statements that the defendant had made to him were false (R. 229-232). Nevertheless, Agent Vaules refused to give the defendant any opportunity to explain what Vaules believed were the inconsistencies in the defendant's statements (R. 203, 229-232, 256).

After serving the defendant with the subpoena (R. 253), Agent Vaules advised the defendant that he was required to talk to Mr. Joel M. Friedman (a special attorney for so-called Strike Force) prior to his appearance before the grand jury (R. 137-138) and Agent Vaules told him that he "had to testify before the Grand Jury". (R. 137-138, 179, 258). The defendant was given to believe that the subpoena required him to respond to questioning by Mr. Friedman and by the grand jury. (R. 129). The agent also told Chevoor that he was not a target of the grand jury (R. 253).

On the morning of January 9, 1974 the defendant was told by Mr. Friedman to go into his office (R. 121-122), and the defendant did so. In the office was Agent Vaules who had served the subpoena upon the defendant (R. 122).

Prior to the questioning, Mr. Friedman stated that he was investigating loan-sharking activities of Michael Pellicci, that the defendant was not a target of the investigation, but that he was, however, prepared to prosecute the defendant if he lied to the grand jury (R. 122, 253).

With the transcript of the December 9, 1973 interception before him,[2] Mr. Friedman then questioned the defendant

[2] The defendant was not aware of the existence of the transcript of the interception of his conversation with Pellicci (R. 153), nor did he know that Mr. Friedman was using it as the basis for his questioning (R. 254, 256). The defendant did not know of the intercept, as the judge who authorized the intercept had previously determined that the government need not disclose the existence of the interception to Chevoor, pursuant to 18 U.S.C. § 2518(8)(d). (App. B, p. 39).

extensively as to whether he owed money to Pellicci or was in any way aware of or involved in Pellicci's loan-sharking activities. The defendant stated, among other things, that he had not borrowed any money from Pellicci; that he had not discussed any loan-shark debts with Pellicci, and that he had never owed Pellicci any money (R. 254). The defendant disclaimed all knowledge of Pellicci's money lending activities (R. 254). In effect, Mr. Chevoor made substantially the same statements to Mr. Friedman that he subsequently made before the grand jury, that same day, and which resulted in the return of the indictment (R. 104-105).

Then Mr. Friedman told the defendant, "you're not telling me the truth." (R. 128). The defendant asked, "What is it that I'm not cooperating with or I'm not telling you the truth about?" (R. 128). At that point Mr. Vaules spoke up and said, "we are not going to tell you what we have on you". (R. 128, 254).

Thereupon Mr. Chevoor was brought before the grand jury (R. 261), "although he was clearly being put in a situation where his testimony could do nothing but serve as the potential basis for an indictment . . . for perjury . . ." (R. 261, App. A, p. 30).

During the January 9, 1973 office interrogation of the defendant, neither Friedman nor Vaules informed the defendant that his conversation with Pellicci on December 9, 1973, had been intercepted; or that his answers to Vaules on January 8 and to Friedman that morning conflicted with the transcript (R. 254, 256). Friedman and Vaules knew of the conflict and knew that the defendant did not know his conversation with Pellicci had been intercepted (R. 256, App. A, p. 26).

At no time, either prior to his appearance before the grand jury or in the grand jury room was the defendant given any of the so-called *Miranda* warnings or advised of

any of his rights under the Fifth or Sixth Amendments (R. 105-106, 255). At no time prior to the defendant's appearance before the grand jury on January 9, 1973 had he retained or consulted counsel in connection therewith (R. 255, App. A, p. 25).

Mr. Friedman also had the transcript with him in the grand jury room. However, he neither advised the defendant of the existence of the transcript or the fact of the interceptions; nor did he permit the defendant to use the transcript to refresh his recollection (R. 24-81, 106, 254-256).

Mr. Chevoor did not complete his grand jury testimony on January 9, 1974 (R. 255). Subsequently, on January 23, 1974, Mr. Friedman again brought the defendant before the grand jury, at which time Mr. Chevoor made a statement to the grand jury asserting certain of his rights (R. 108). Mr. Friedman then asked the defendant a number of questions and threatened the defendant with prosecution for perjury (R. 88). Thereafter the same grand jury before which Mr. Chevoor had appeared on the two occasions of January 9 and January 23 returned this indictment against Mr. Chevoor (R. 108).

The district court found that: "The totality of the circumstances preceding the defendant's grand jury testimony, made him a potential, if not probable, grand jury target." (R. 256, App. A, p. 26).

". . . Having twice questioned the defendant regarding the same material, and having twice received the same responses that were in clear conflict with the intercept transcript, it would have been unrealistic for Vaules and Friedman to assume that defendant would do anything but give the same, apparently untruthful, answers before the grand jury . . . . (R. 257, App. A, p. 27).

"Also misleading was Vaules' statement to the defendant that 'he had to testify'. While the subpoena required the

defendant's appearance before the grand jury, it did not require substantive testimony from him absent a grant of immunity . . . . (R. 258, App. A, p. 28).

"It was unnecessary for the Government to question the defendant before the grand jury for any reason except to get him to testify falsely under oath. There was almost no chance that in the mere passage of a few minutes, he would change his twice-told story. . . That the Government's prime purpose in putting him on the stand was to obtain a perjury indictment is underscored by the Strike Force attorney's statement to the defendant prior to his grand jury testimony. 'I just got six or seven guys like you for perjury.' . . ." (R. 263-264, App. A, pp. 31-32).

Reasons for Granting the Writ

I. WHERE THE DISTRICT COURT MADE FINDINGS OF FACT, WHICH WERE SUPPORTED BY THE EVIDENCE AT THE HEARING ON DEFENDANT'S MOTION TO DISMISS, THE COURT OF APPEALS ERRED WHEN IT "SUBSTITUTED ITS OWN FINDING(S)" AND IMPLICITLY "HELD THAT THE TRIAL JUDGE'S (OPINION AND ORDER DISMISSING THE INDICTMENT) AMOUNTED TO AN ABUSE OF DISCRETION" CONTRARY TO *United States* v. *Johnson*, 327 U.S. 106, 110-111.

The defendant submits that the court of appeals for the First Circuit violated the principles enunciated in *United States* v. *Johnson*, 327 U.S. 106, 110-111 (1946) when it "substituted its own finding(s)" and rejected the district court's findings which were supported by the evidence at the hearing on the defendant's motion to dismiss. As this Court noted in *United States* v. *Johnson*, *supra*, at 111, it is "important for the orderly administration of criminal justice that findings on conflicting evidence by

trial courts on motions . . . remain undisturbed except for most extraordinary circumstances".

In the instant case, the district court held an evidentiary hearing on defendant's motions to suppress and dismiss at which the defendant and two F.B.I. agents testified, and the parties entered into a number of stipulations as to the facts. In addition, the district court received in evidence some fourteen exhibits including the transcripts of the defendant's grand jury testimony and of the interception of his conversation (R. 99-250).

Based upon the evidence before it, the district court found, among other things, that:

> "The totality of these circumstances requires the conclusion that the defendant was ensnared (into committing perjury) . . . . It was unnecessary for the Government to question the defendant before the grand jury for any reason except to get him to testify falsely under oath. There was almost no chance that in the mere passage of a few minutes, he would change his twice-told story . . . . That the Government's prime purpose in putting him on the stand was to obtain a perjury indictment is underscored by the Strike Force attorney's statement to the defendant prior to his grand jury testimony. 'I just got six or seven guys like you for perjury.' . . ." (R. 263-264, App. A, pp. 31-32).

The court of appeals stated that "the facts do not support" the district judge's finding[3] and substituted its own finding that the Government "did not ensnare Chevoor into committing perjury" (App. B, p. 50). This extraordinary departure from the accepted and usual course of

[3] The Court of Appeals characterized the district court's finding as a defense "argument" (App. B, p. 49).

judicial proceedings, in conflict with the decisions of this Court in *United States* v. *Johnson*, 327 U.S. 106 (1946) and *Campbell* v. *United States*, 373 U.S. 487, 493-94 (1963), is demonstrable from an analysis of the evidence and the subsidiary findings of the trial judge which support his conclusion that the government deliberately ensnared the defendant into committing perjury:

1. The trial court found, and the court of appeals acknowledged, that the Government failed and refused to disclose to the defendant that his conversation had been intercepted (R. 256, App. B, p. 39). Further, it was undisputed that the Government concealed from the defendant the existence of its possession of the transcript of the December 9, 1973 interception. Moreover, as Agent Vaule conceded at the hearing, the attitude of the Government was reflected by his statement to the defendant "we are not going to tell you what we have on you" (R. 254, App. B, p. 39). Clearly, if the Government had sought to treat the defendant fairly and in good faith, the Government would have given the defendant an opportunity to explain what the prosecutor believed were the discrepancies between the defendant's statements and the transcript of the intercepted conversation. Instead the prosecutor merely reiterated threats of prosecution.[4]

2. As the district court found, and as the court of appeals all but conceded,[5] "having twice questioned the defendant regarding the same material, and having twice received the same responses that were in clear conflict with the intercept transcript, it would have been unrealistic for

[4] It should be noted that at the time of the defendant's second appearance before the grand jury, the prosecutor again threatened the defendant with prosecution for perjury but refrained from advising the defendant of his right of recantation under 18 U.S.C. § 1623 (R. 84-89).

[5] The Court of Appeals recognized that the government brought the defendant before the grand jury "in the anticipation that he would perjure himself." (App. B, p. 50).

Vaules and Friedman to assume that the defendant would do anything but give the same apparently untruthful answers before the grand jury .... There was almost no chance that in the mere passage of a few minutes he would change his twice-told story." In effect the district court found that, as in *United States* v. *Thayer*, 214 F. Supp. 929 (D.C. Col. 1963), "the Government was substantially certain . . . that the defendant would give false answers." Nevertheless, the court of appeals relied on its own interpretation of the evidence stating "it was possible (even though *unlikely*) that when it came to the crunch, of testifying, under oath, with a transcript, Chevoor would succumb to the truth." (Emphasis supplied). (App. B, p. 50).

3. Perhaps the most significant factor underlying the district court's decision was the failure of the prosecutor, Mr. Friedman, to testify at the hearing, even though he was in effect invited to do so by the District Judge (R. 134). Mr. Friedman "was not called as a witness by the Government . . . and we must assume that his testimony would not have been helpful (to the Government)", *United States* v. *Di Re*, 332 U.S. 581, 593 (1948). Indeed, "silence is often evidence of the most persuasive character." *United States* v. *Tod*, 263 U.S. 149, 154 (1923).[6]

4. The Government brought the defendant before the grand jury without the benefit of any *Miranda* warnings and subjected the defendant to what can only be described as a hostile, searching and, in many instances, confusing interrogation (R. 46-48, 62, 67, 263). The transcript of defendant's grand jury testimony reveals that the prosecutor subjected the defendant to a lengthy interrogation, even after Chevoor's initial denial of involvement in Pel-

[6] Certainly Mr. Friedman knew whether he had intended to ensnare the defendant into committing perjury.

licci's activities which became the subject of Count I of the indictment (R. 43, 90). Such continued and hostile questioning could serve only to extract further perjury from the defendant for which to indict him[7] and further manifests the prosecutor's original intention to obtain a perjury indictment against the defendant.

5. Finally, Mr. Friedman, undoubtedly piqued by what he believed to be the defendant's failure to cooperate, stated to the defendant just prior to bringing him before the grand jury: "I just got six or seven guys like you for perjury." By the use of the phrase "like you" Friedman clearly indicated his intent to ensnare the defendant and that he "was at least thinking about, if not considering a prosecution for perjury". *United States* v. *Thayer*, 214 F. Supp. 929, 931 (D.C. Col. 1963).

As this Court has held in an analogous case, the district court's findings "are ones of fact, the determination of which may not be disturbed unless clearly erroneous.... (The district court's conclusions) may well have depended upon nuances of testimony and demeanor of witnesses." *Campbell* v. *United States*, 373 U.S. 48, 493. For the court of appeals to have rejected the district court's findings and to have substituted its own contrary conclusion upon which to rest its reversal of the district court's decision was clearly erroneous. "While the appellate court might intervene when the findings of fact are wholly unsupported by evidence . . . *it should never do so where it does not clearly appear that the findings are not supported by any evidence.*" (Emphasis supplied) *United States* v. *Johnson*, 327 U.S. at 111-112.

[7] Counts II and III of the indictment relate to testimony which appears some 33 transcript pages after the testimony in Count I (R. 43, 76).

II. THE DISTRICT COURT'S DISMISSAL OF THE INDICTMENT IN THE EXERCISE OF "THE COURT'S SUPERVISORY POWERS OVER GRAND JURY PROCEEDINGS" WAS WARRANTED, WHERE THE DISTRICT COURT FOUND (1) THAT "THE GOVERNMENT'S PRIME PURPOSE" IN BRINGING THE DEFENDANT BEFORE THE GRAND JURY "WAS TO OBTAIN A PERJURY INDICTMENT" AND (2) THAT THE GOVERNMENT MISLED THE DEFENDANT INTO BELIEVING THAT HE HAD NO RIGHT TO ASSERT HIS FIFTH AMENDMENT PRIVILEGE BEFORE THE GRAND JURY.

The decision of the First Circuit below, reversing the district court's dismissal of the indictment, where the government brought the defendant before the grand jury "in the anticipation that he would perjure himself" (App. B, p. 50), and where the government misled the defendant into believing he had no right to assert his Fifth Amendment privilege before the grand jury (App. A, p. 28), is in substantial conflict with the decision of the Eighth Circuit in *Brown* v. *United States*, 245 F.2d 549 (1957), and the Fifth Circuit in *United States* v. *Rangel*, 496 F.2d 1059 (1974). The opinion of the First Circuit is also in direct conflict with decisions of various district courts including that of the District Court of Connecticut in *United States* v. *Pepe*, 367 F. Supp. 1365 (1973) and that of the District Court of Colorado in *United States* v. *Thayer*, 214 F. Supp. 929 (1963), recently cited by this Court with approval in the case of *United States* v. *Kordel*, 397 U.S. 1, 12 (1970).

Each of these courts has upheld the right of a district court to suppress grand jury testimony and dismiss an indictment where there has been governmental "impropriety" as referred to in *Kordel, supra,* at 12, or where the conduct of the prosecutor has been so fundamentally unfair as to fall below the civilized standards referred to in *McNabb* v. *United States*, 318 U.S. 332, 340

(1943). Although the factors relied upon by those courts in dismissing indictments are present in the instant case, the First Circuit below, in effect ruled that the district court had no discretion to dismiss this indictment. Defendant submits that ruling was error.

In *McNabb* v. *United States*, 318 U.S. 332, 350 this Court stated:

> ". . . Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. . . .

Implementing the philosophy of *McNabb*, the district court dismissed the indictment based upon what it deemed to be the unique and compelling circumstances of this case, at least some of which are as follows:

> 1) The defendant, Robert Chevoor, was a high school teacher who the government believed had become a loan-shark victim (R. 260).
>
> 2) The defendant's conversations had been intercepted and transcribed unbeknownst to him (R. 256).
>
> 3) The defendant was misled into believing that he "had to *testify*" before the grand jury (R. 258).
>
> 4) The government compelled the defendant to testify before the grand jury, without the benefit of any *Miranda* warnings, for the purpose of asking him the same things he had already discussed falsely with government agents, and the government knew or should have known that the defendant would give the same

apparently untruthful answers to the grand jury (R. 262-263).

5) The prosecutor deliberately refrained from advising the defendant of the interception of his conversation or permitting the defendant to explain the inconsistencies between the intercept transcript and the defendants' statements (R. 254).

6) At the time of the defendant's appearance before the grand jury, the defendant's testimony "could do nothing but serve as the basis for an indictment, either for perjury . . . . It was unnecessary for the government to question the defendant before the grand jury for any reason except to get him to testify falsely under oath . . . (and) the Government's prime purpose in putting him on the stand was to obtain a perjury indictment" (R. 261, 263).

While the First Circuit rejected the ultimate conclusion of the district court that the government's prime purpose in bringing the defendant before the grand jury was to obtain a perjury indictment, the Court of Appeals recognized that it was "unlikely" that the defendant would change his twice-told story (App. B, p. 50). The Court of Appeals also acknowledged that the government brought Chevoor before the grand jury "in the anticipation that he would perjure himself." (App. B, p. 50). Thus, as in *United States* v. *Thayer*, 214 F. Supp. at 931, "the Government was substantially certain . . . that the defendant would give" the same apparent untruthful answers before the grand jury that he had previously given to Friedman and Vaules.

In an alternative holding, the Eighth Circuit in *Brown* v. *United States*, 245 F.2d 549 (1957) considered the question of whether the government had acted improperly in

summonsing the defendant apparently for the purpose of extracting testimony from him with a view to prosecuting him for perjury. The court sustained the defendant's argument, that this conduct was an abuse of the grand jury, stating as follows:

> "The court is of the opinion that the evidence in this case clearly established that (the Government's) purpose was simply to do what (it) did, viz., to extract from the defendant his testimony about the talk in which he had taken part in St. Louis on May 3, 1950, knowing that his recollection of it differed from that of others present, and to get him indicted for perjury. (The Government) knew how each of the parties to that talk, including the defendant, remembered it because each had made his sworn statement to (an) invesitgator and three of the parties to the talk had already given their recollection of it to the grand jury before (the Government) called the defendant. Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt." *Brown* v. *United States*, 245 F.2d at 555.

Similar reasoning is found in *United States* v. *Cross*, 170 F. Supp. 303, (D.C. D.C. 1959), involving allegedly perjurious testimony before a Congressional Investigating Committee. See also *United States* v. *Icardi*, 140 F. Supp. 383 (D.C. D.C. 1956).

In *United States* v. *Thayer*, 214 F. Supp. 929 (D.C. Col. 1963), the defendant was indicted for perjury before the United States Securities and Exchange Commission. After consideration of questions with respect to the defendant's privilege against self-incrimination, the court concluded

that "The issue is also whether the methods employed in obtaining and inducing his testimony show unfairness which, quite apart from the prohibitions of the Fifth Amendment, render the evidence so obtained inadmissible." 214 F. Supp. at 930. The court held:

> "From the record which is before the court, there are indications that the Securities and Exchange Commission was at least thinking about, if not considering, a prosecution for perjury prior to the April nineteenth interrogation. . . .
>
> "If it should appear that the Government was substantially certain prior to the April nineteenth hearing that the defendant would give false answers, it would then follow that the testimony so induced should not be received in evidence. . . .
>
> "*The fact that the accused has been warned that false answers can result in a perjury prosecution can be of little value in circumstances where the defendant may have been misled by the fact that the main object of the investigation appeared to be inquiry as to substantive violations.*" (Emphasis supplied) 214 F. Supp. at 931-932.

The conflict with the courts in *Brown* and *Thayer* is apparent from the First Circuit's holding: "We cannot say that calling Chevoor in these circumstances *even in the anticipation that he would perjure himself* is beyond the pale of permissible prosecutorial conduct." (Emphasis supplied) (App. B, p. 50). To the extent that the holding below is found upon the court of appeals' rejection of the district court's findings of fact, the defendant has argued, above, that the First Circuit was in error. Equally, to the extent that the holding purports to be a proposition of law, the defendant submits that it was wrongly decided by the First Circuit and that the raionale of the Eighth Circuit, the District Court of Colorado and the district

court below is more persuasive and warrants the dismissal of the indictment herein. Accordingly, the defendant urges that this issue be given plenary consideration.

This case also raises a substantial question as to the discretion of a district court in dismissing an indictment where there has been improper prosecutorial conduct impinging upon the defendant's constitutional rights.

The district court found, and the court of appeals does not appear to dispute, that the defendant was misled by a government agent when he advised the defendant that "he had to testify" before the grand jury (App. A, p. 28; App. B, p. 38). The defendant was given to believe that the subpoena requiring him to respond to questioning by Mr. Friedman before the grand jury and that he had no right to assert his Fifth Amendment privilege before the grand jury (R. 129, 137-138, 179, 258; App. A, p. 28; App. B, p. 35). The defendant submits that on the basis of that finding alone the district court was warranted in dismissing the indictment against him.

In *United States* v. *Rangel*, 496 F.2d 1059 (1974), the Fifth Circuit, while relying substantially upon its opinion in *United States* v. *Mandujano*, 496 F.2d 1050 (5th Cir. 1974), *cert. grant.* 95 S. Ct. 1422, affirmed the district court's suppression of perjured grand jury testimony on the ground that "the proceedings here were even more unfair than those in *Mandujano* because . . . (the prosecutor's statement) contained an implicit threat which all but negated . . . the privileges against self-incrimination." 496 F.2d at 1062.

Similarly, in *United States* v. *Pepe*, 367 F. Supp. 1365 (D.C. Conn. 1973) the prosecutor advised the defendant therein that he had to answer questions and the court concluded that such advice constituted "an impairment of the self-incrimination privilege." 367 F. Supp. at 1369. In discussing whether to dismiss the indictment the District Court of Connecticut stated:

There is no doubt that a court has discretion to dismiss an indictment obtained through a violation of a defendant's constitutional rights. . . .

Useful guidance on this question is furnished by Judge Clark's opinion in *United States* v. *Cleary, supra.* In reversing a district court that had dismissed an indictment because of impairment of the self-incrimination privilege, the Court observed:

> The important factor is the lack of even the slightest suggestion that government officials applied any pressure or engaged in any form of misconduct which contributed to (the witness's) testifying. *Id.* 265 F.2d at 462.

Unhappily that cannot be said here. While not every impairment of constitutional right stems from governmental misconduct, *the flagrant abuse here fully justifies the sanction of dismissal of the indictment.* (Emphasis supplied) 367 F. Supp. at 1370.

The failure of the First Circuit to affirm the decision of the district court is in conflict with decisions of the Fifth Circuit and the District Court of Connecticut and various other federal courts confronted with similar instances of governmental abuse of grand jury proceedings. Those federal courts have affirmed the right of a district court to exercise its discretion by dismissing an indictment or suppressing grand jury testimony under circumstances such as those revealed here. However, the Court of Appeals in this case in effect held that the district court had no such discretion. Accordingly, the question presented here is important to provide guidance to the lower courts.

Only this Court can provide a definite resolution of what is apparently an existing conflict among the lower federal courts and only this Court can set the standards for the

courts of appeals in reviewing a decision of a district court in suppressing grand jury testimony and dismissing an indictment in the exercise of the court's supervisory powers over grand jury proceedings. Accordingly, plenary consideration of the instant case seems appropriate.

Conclusion

The decision of the court of appeals raises serious questions as to the standards of review to be employed by federal appellate courts and it raises substantial questions as to the administration of criminal justice in the federal courts and the powers of a district court to dismiss an indictment predicated upon prosecutorial misconduct and the impairment of constitutional rights. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL T. SMITH
JEFFREY M. SMITH
HARVEY R. PETERS
89 State Street
Boston, Massachusetts 02109
Attorneys for the Petitioner, Defendant.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. No. 74-72-T

UNITED STATES OF AMERICA
v.
ROBERT CHEVOOR

OPINION AND ORDER

TAURO, D.J. March 21, 1975

The defendant, Robert Chevoor, a school teacher in the Watertown High School, has been charged in a three count indictment with knowingly making false statements to a federal grand jury, in violation of 18 U.S.C. § 1623.[1] He has moved to suppress his grand jury testimony and to dismiss this indictment because of the Government's failure to inform him of his Fifth Amendment rights.[2]

Findings of Fact

In January 1973, the Government commenced an intensive investigation into alleged loan sharking activities of one Michael Pellicci (Pellicci). As part of this investigation, the Government applied for and received a

[1] The indictment charged that Chevoor answered falsely when he denied owing money to Michael Pellicci; when he denied knowing of others who had borrowed money from Pellicci; and when he denied ever discussing with Pellicci the payment of loans made by Pellicci to others.

[2] Defendant has also moved to dismiss the indictment because of the Government's failure to advise him of the recantation provisions of 18 U.S.C. § 1623(d). *See United States* v. *Lardieri*, No. 73-1750, (3d Cir. May 14, 1974), *rev'd on rehearing*, (Dec. 18, 1974). Since the indictment must be dismissed for the reasons set forth in this opinion, the court does not reach this question, nor does the court reach defendant's motions to suppress wire tap and pen register evidence, tangible evidence and certain oral statements.

court order, under the provisions of 18 U.S.C. § 2518, authorizing the interception of telephone and oral communications from Pellicci's office in Watertown and from his home telephone in Waltham.

The order was issued on November 27, 1973, and interception of calls from Pellicci's home telephone commenced on November 29, 1973. Due to technical difficulties, listening devices for oral conversations, and telephone taps for both office telephones, were not installed until December 5, 1973.

Telephone conversations between the defendant and Pellicci's wife and between the defendant and Pellicci were intercepted on December 7, 1973. These related to setting up a meeting between the defendant and Pellicci. On Sunday, December 9, 1973, a twenty-seven minute conversation between the defendant and Pellicci in Pellicci's office was intercepted, recorded and transcribed. Part of this conversation related to financial transactions between Pellicci and other individuals.

On the evening of January 8, 1974, FBI agent James Vaules (Vaules), along with another agent, went to defendant's home. Values' purpose in doing so was to serve a subpoena calling for the defendant to testify the following day before the grand jury with respect to the Pellicci investigation. Prior to serving the subpoena or telling the defendant he would have to appear before the grand jury, Vaules told the defendant he was not a grand jury target, but that it was investigating Pellicci's loan sharking activities. Vaules asked the defendant a number of questions concerning Pellicci, including whether he owed him any money, or knew others that did. The defendant's reply to both queries was negative, and clearly inconsistent with the transcript of his intercepted December 9, 1973 conversation with Pellicci. After talking

with the defendant for about fifteen minutes, Vaules told him to report at the office of Strike Force Attorney Joel Friedman (Friedman) prior to his appearance the next day before the grand jury. This instruction also appeared on the face of the subpoena.

The following day, January 9, 1974, the defendant reported as instructed to Friedman's office. Friedman, in the presence of Vaules, told the defendant that he was not a grand jury target, but that Pellicci was under investigation for alleged loan sharking activities. Friedman warned the defendant that he would be prosecuted for perjury if he gave false testimony to the grand jury.

With the transcript of the December 9, 1973, interception before him, Friedman then asked the defendant whether he owed money to Pellicci, whether he knew others that owed money to Pellicci, and whether he had ever discussed with Pellicci the repayment of loans that Pellicci had made to others. The defendant denied owing Pellicci any money and disclaimed all knowledge of his money lending activities.

Friedman then told the defendant that he was not cooperating and that he was not telling the truth. The defendant asked Friedman how and in what way was he not cooperating or telling the truth. At this point, Vaules replied, "We are not going to tell you what we have on you." Hearing Transcript, July 9, 1974, at 30.

During their January 9, 1973 office interrogation of the defendant, neither Friedman nor Vaules informed him that his conversation with Pellicci on December 9, 1973, had been intercepted; that the questions asked that morning by Friedman had been based on the transcript of that conversation; or that his answers to Vaules on January 8 and to Friedman that morning conflicted with the transcript. Nor did Friedman or Vaules inform the defendant

as to the consequences of giving false statements to a federal official.[3]

Shortly thereafter, Friedman escorted the defendant to the grand jury room and asked him essentially the same questions that he had asked in his office and that Vaules had asked on January 8, 1974. The defendant gave the same negative responses. At no time prior to his January 9 interrogation by Friedman, either in his office of before the grand jury, was the defendant given *Miranda*[4] warnings or otherwise advised of his rights under the Fifth and Sixth Amendments. He was not accompanied by counsel, nor did he consult with counsel at any time prior to or during either interrogation.

The defendant's testimony before the grand jury was not completed on January 9 and he was told to return on January 23, 1974. Prior to that date, the defendant consulted with Attorney Paul T. Smith (Smith) who, thereafter, attempted unsuccessfully to secure a copy of his

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[3] "Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. §1001.

The F.B.I. is an agency within the meaning of 18 U.S.C. § 1001. *See United States* v. *Lambert*, 501 F.2d 943 (5th Cir. 1974) (*en banc*); *United States* v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied* 389 U.S. 1006 (1967). *But see Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967).

No case holding that an assistant United States Attorney speaking with someone in his office is an "agency" within the purview of 18 U.S.C. § 1001 has been brought to the attention of the court. The scope of the statute is broad enough to reach this situation. "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." *United States* v. *Bramblett*, 348 U.S. 503, 507 (1955) (footnotes omitted). In any case, F.B.I. Agent Vaules was also present during this interrogation.

[4] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

January 9 grand jury testimony. Smith then advised the defendant to assert his constitutional rights and refuse to testify when he appeared before the grand jury on January 23. The defendant followed this advice. On March 13, 1974, this indictment charging the defendant with perjury was returned by the same grand jury.

Conclusions of Law

I

There is no duty to inform a grand jury witness, as opposed to a grand jury target, of his constitutional rights, *see, e.g., United States* v. *DiMichele*, 375 F.2d 959 (3rd Cir. 1967). The totality of the circumstances preceding this defendant's grand jury testimony, however, made him a potential, if not probable, grand jury target. As such, he should have been advised, prior to his interrogation before the grand jury, of his right to remain silent. The Government's failure to do so requires dismissal of this indictment.

The transcript of the defendant's intercepted December 9, 1973 conversation with Pellicci formed the framework for the questions that were asked of him by Vaules on January 8 and by Friedman on January 9, both in Friedman's office and before the grand jury. Friedman and Vaules knew that defendant's answers to them were in conflict with the intercept transcript, and that the defendant did not know his conversation with Pellicci had been intercepted.[5]

Friedman's representation to the defendant, prior to his testimony on January 9, that he was not a grand jury target was at the least misleading. Both he and Vaules knew, or should have known, that the defendant was subject to possible indictment for having made false state-

[5] The judge who authorized the intercept had previously determined that the defendant was not an intercept party to whom the Government owed the responsibility of disclosing the existence of the wiretap. 18 U.S.C. § 2518(d).

ments to a federal officer. 18 U.S.C. § 1001.[6] Moreover, having twice questioned the defendant regarding the same material, and having twice received the same responses that were in clear conflict with the intercept transcript, it would have been unrealistic for Vaules and Friedman to assume that defendant would do anything but give the same, apparently untruthful, answers before the grand jury.

Pellicci was undoubtedly the Government's prime interest. But it should have been apparent to Friedman and Vaules that by calling the defendant before the grand jury, without warning him of his rights, they were making him a likely, if not inevitable, grand jury target, albeit for making false statements as opposed to loan sharking. By doing so, they put the defendant in a "no win" position, a classic Hobson's choice. A denial of his conversation with Pellicci would eventually, and in fact did, produce a perjury indictment. If, on the other hand, he changed his story and gave grand jury testimony con-

[6] In assessing whether the witness was a virtual or putative defendant, the special attorney's statement to the defendant that he was not a target is not controlling. *See United States* v. *Mandujano*, 496 F.2d 1050, 1053 (5th Cir. 1974) *aff'g* 365 F. Supp. 155 (W.D. Tex. 1973); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio 1968), *aff'd on other grounds*, 421 F.2d 1019 (6th Cir.), *cert. denied* 400 U.S. 849 (1970). In *Fruchtman*, the Government attorney had filed an affidavit indicating that he did not consider the witness to be a potential defendant until after his grand jury interrogation. The court held that the witness was a virtual defendant and concluded that "the question should be examined in terms of what the record and transcript show and not on the more subjective facts contained in the Government's affidavit." 232 F. Supp. at 536.

Whether the defendant would have a good defense to an indictment under 18 U.S.C. § 1001 by construing his statements as an "exculpatory no," *see Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962), is irrelevant in considering whether his statements made him a potential defendant. While there are differences between sections 1001 and 1623, the fact that an essentially similar statement became the basis of a perjury indictment demonstrates that he was at least a potential defendant under section 1001.

sistent with the intercept transcript, he faced at least the possibility of being indicted for having given false statements to federal officers on two occasions.[7]

Not only was the defendant not warned of his potential danger, he was in a sense lulled, albeit unintentionally, by Vaules' and Friedman's separate assurances that he was not a target of the grand jury. Also misleading was Vaules' statement to the defendant that "he had to testify." While the subpoena required the defendant's appearance before the grand jury, it did not require substantive testimony from him, absent a grant of immunity.[8]

Defendant's situation here is quite similar to that addressed by the court in *United States* v. *Mandujano*, 496 F.2d 1050 (5th Cir. 1974), *petition for cert. filed* 43 U.S. L.W. 3456 (U.S. Dec. 16, 1974) (No. 74-754). In that case, the defendant was indicted for perjury and for attempted distribution of heroin following his grand jury testimony concerning a drug transaction between himself and a Government attorney. The special attorney who questioned Mandujano before the grand jury knew the details of the attempted heroin sale. The interrogation tracked these details. Rejecting the Government's claim that Mandujano was not a target of the grand jury, the district court held that he was a virtual or putative defendant in a custodial situation who was entitled to full *Miranda* warnings. The circuit court affirmed the district court order suppressing Mandujano's grand jury testimony.

> Given the nature of the investigation and the questions tendered by the government attorney, the district court held, and the Court agrees, that full

[7] *See* note 3 *supra*.

[8] It is clear that, in addition to appearing before the grand jury, the defendant would have been required to personally assert his constitutional rights. *See, e.g., United States* v. *Capaldo*, 402 F.2d 821 (2d Cir. 1968), *cert. denied* 394 U.S. 989 (1969).

> *Miranda* warnings should have been accorded Mandujano who was in the position of a virtual or putative defendant.

496 F.2d at 1052.

In discussing the remedy to be granted, the court noted the general rule that the Government's failure to warn a witness of his right to remain silent does not give him a license to commit perjury. *United States* v. *Orta*, 253 F.2d 312 (5th Cir.) *cert. denied* 357 U.S. 905 (1958). In *Mandujano*, the court carved out a limited exception to that rule by stating:

> We simply cannot ignore the unfairness in baiting this defendant before the grand jury and overlook the prnciple that the Fifth Amendment must always be as broad as the mischief against which it seeks to guard.

496 F.2d at 1056.

The facts in this case are at least as compelling as those in *Mandujano*. It appears clear that prior to the December 9, 1973 intercept of his conversation with Pellicci, the defendant was not a subject of criminal investigation. The underlying theory of the Government's opposition to defendant's motions to suppress and dismiss would be inconsistent with a finding that defendant was anything but a high school teacher who became a loan shark victim. On January 8, 1974, prior to being served with a grand jury summons, the defendant was questioned about Pellicci by an FBI agent. The agent's questions were based on information obtained from the intercept tapes. The defendant did not know his December 9 conversation with Pellicci had been taped. Defendant's responses to the agent on January 8 were at least arguably inconsistent with the intercept tapes. During his conversation with the defendant, the agent told him he was not a grand jury target. The agent served a summons and told the defen-

dant to report to the Strike Force attorney's office the next day. At this point, the defendant was already subject to prosecution for having given false information to a federal officer.

The next day, at the Strike Force office, the same questions were asked by the Strike Force attorney in the agent's presence, and the same responses were uttered by the defendant. The defendant was given no warnings and was not told of the intercept tape. At this point, he was subject to a second count of giving false information to a federal officer.

By this time the defendant was clearly something other than a loan shark victim whose testimony was sought to nail a grand jury target. He had graduated to the position of being a likely defendant in a criminal action based on 1 U.S.C. § 1001. Under the circumstances, he should have been warned of his Fifth Amendment right to remain silent prior to the second inquiry by a federal officer. But the Government's failure in this regard is not the issue before the court.

Immediately following the second inquiry, the defendant was brought before the grand jury, was asked the same questions, and gave the same responses. He was not told of the intercept tape. He was not warned of his rights, although he was clearly being put in a situation where his testimony could do nothing but serve as the potential basis for an indictment either for perjury or giving false information to a federal officer.

Unique and compelling circumstances are involved here: 1) a wire tap of a conversation between the defendant and another, unbeknownst to the defendant, 2) two separate statements to federal officials inconsistent with a wire tap, 3) a Government representation to the defendant that he was not a grand jury target, 4) summons of the defendant before a grand jury, without benefit of any *Miranda*

warnings, for the purpose of asking him the same things he had already discussed falsely with the agents.

The totality of these circumstances requires the conclusion that the defendant was ensnared into a position where he was at least possibly, if not inevitably, going to emerge as a target of the very grand jury before whom he was required to appear. Fundamental fairness required that he not be compelled to testify before the grand jury without at least having been told of his right to remain silent.

Certainly, there is no more serious crime than that of perjury. The sanctity of the testimonial oath, freely taken, must be observed and enforced at the risk of undermining the very foundation of our judicial process. And so it is clear that the defendant had no right to lie to the grand jury. But he did have a right not to be ensnared into a position where he could not escape the possibility of criminal prosecution because of his own utterances before the grand jury. The Government should not have placed the defendant in such a position of jeopardy.

By forcing the defendant to testify, without alerting him in any way as to his precarious position, the Government turned the screw too tightly and thereby stripped the thread of its case against him. It was unnecessary for the Government to question the defendant before the grand jury for any reason except to get him to testify falsely under oath. There was almost no chance that in the mere passage of a few minutes, he would change his twice told story. And if he did, it would have been clear that the defendant had previously given false information to a federal officer. The Government, however, did not need his grand jury testimony to bring criminal action against him for having given false information on two occasions to a federal officer. That the Government's prime purpose in putting him on the stand was to obtain a perjury in-

dictment is underscored by the Strike Force attorney's statement to the defendant prior to his grand jury testimony, "I just got six or seven guys like you for perjury . . . ." Hearing Transcript, July 9, 1974, at 30.

II

Even if the Constitution does not require that the Government warn a grand jury witness in a situation such as this of his right to remain silent, the federal courts, by virtue of their supervisory power over grand jury proceedings, may require that the Government inform such a witness of his right to remain silent. *See McNabb* v. *United States*, 318 U.S. 332 (1943).

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as "due process of law" and below which we reach what is really trial by force.

Id. at 340.

It is particularly appropriate for a federal district court to exercise its supervisory powers in the context of a grand jury proceedings. The district court is charged with several important functions in overseeing grand jury proceedings, including compelling testimony of witnesses, production of records, and modifying or quashing subpoenas. *See United States* v. *Calandra*, 414 U.S. 338, 346 n. 4 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J. concurring). A legitimate discharge of this supervisory responsibility is that of requiring the Government to inform a potential defendant of his right to remain silent.

"A grand jury is clothed with great independence in many areas, but it remains an appendage of the court . . . ."

Brown v. *United States*, 359 U.S. 41, 49 (1959). Neither the grand jury's independence nor its basic functions are hampered by requiring that a defendant, actual or putative, be warned of his most fundamental right — the right against self-incrimination — prior to testifying before the grand jury. In requiring that full *Miranda* warnings be given an actual defendant prior to testifying before the grand jury, the court in *United States* v. *Kreps*, 349 F. Supp. 1049, 1053 (W.D. Wis. 1972), noted "[i]t would be a simple prophylactic rule, easily complied with . . . ."

The cases cited by the Government in opposition to defendant's claim are inapposite. In many of those cases, the question of informing a witness of his *right to remain silent* was not in issue. The witnesses in those cases had been informed of their right to remain silent, but sought a mandate requiring all *Miranda* warnings.[9] *See United States* v. *DiGiovanni*, 397 F.2d 409, 412 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968) (transcript disclosed witnesses had been informed of right to silence); *United States* v. *Binder*, 453 F.2d 805, 809 (2d Cir. 1971), *cert. denied* 407 U.S. 920 (1972) (defendant was given full *Miranda* warnings); *United States* v. *Daniels*, 461 F.2d 1076 (5th Cir. 1972) (defendant read and signed Waiver of Fifth Amendment rights); *United States* v. *Winter*, 348 F.2d 204 (2d Cir.) *cert. denied*, 382 U.S. 955 (1965). (Court found defendant had been fully advised of right to remain silent). *But see Robinson* v. *United States*, 401 F.2d 248 (9th Cir. 1968). While Robinson did not receive a warning of his right to remain silent, the case is factually

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[9] As a matter of sound practice, it would seem appropriate to give a potential defendant full *Miranda* warnings before he testifies in a grand jury proceeding. This case does not require a determination that such a practice is constitutionally compelled. Here, the defendant was not informed of his most basic right—the right against self-incrimination. Whether he was entitled to be informed of that right is the narrow issue raised in this case.

distinguishable. In that case, the Government had no knowledge that his prior testimony was false and the court specfically found that he was not a putative defendant.

Here the Government knew from its first contact with defendant that his statements to federal officials prior to his grand jury testimony were in conflict with the intercept transcript. The Government knew, therefore, that defendant's grand jury testimony would either be in similar conflict, or else in conflict with his statements to federal officials.

III

The Government erred by failing to inform the defendant of his right to remain silent. The more difficult question is whether the usual remedy for failure to give constitutional warnings — suppression of the testimony — should be employed where the testimony itself constitutes perjury.[10]

As a general rule, a failure to inform a witness of his right to remain silent would not excuse perjury or result in the suppression of perjured testimony. *See, e.g., United States* v. *Orta,* 253 F.2d 312 (5th Cir. 1958); *United States* v. *Daniels,* 461 F.2d 1076 (5th Cir. 1972). The rationale for this rule is twofold. In the first place, a constitutionally abused witness who, nonetheless, testifies truthfully, albeit to his damage, can move to suppress his testimony. *Cf. United States* v. *Knox,* 396 U.S. 77 (1969). A second rationale is that the Fifth Amendment protection against self-incrimination relates to past acts of criminal conduct and was not intended to create an immunity precluding prosecution for perjury. *See Glickstein* v. *United States,* 222 U.S. 139 (1911).

Neither rationale, however, is adequate in this situation. Here a virtual defendant was called before the grand jury

[10] The same question must be answered even if the Government's actions here are sanctioned under the court's supervisory powers.

without being advised of his right to remain silent, and was given the stark choice between perjury and self-incrimination. *See, e.g., United States* v. *Mandujano,* 496 F.2d 1050, 1058 (5th Cir. 1974); *United States* v. *Rangel,* 496 F.2d 1059 (5th Cir. 1974); *United States* v. *Fruchtman,* 282 F. Supp. 534 (N.D. Ohio 1968), *aff'd on other grounds* 421 F.2d 1019 (6th Cir.), *cert. denied* 400 U.S. 849 (1970). *But see United States* v. *Andrews,* 370 F. Supp. 365, 371 (D. Conn. 1974). Under these special circumstances, the only meaningful relief that can be granted is suppression of the testimony or dismissal of the indictment. In *Mandujano,* the Fifth Circuit addressed this problem in detail, noted that even *Orta* appeared to recognize such an exception, 496 F.2d at 1056, and concluded that "the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment." *Id.* at 1058. On that basis, the court upheld the suppression of the defendant's grand jury testimony.

The web of circumstances that entwined this defendant compel application to him of the lmited exception to the *Orta* rule outlined in *Mandujano.* Due process means fundamental fairness. The same standard is often what motivates remedial supervisory action by federal courts. And so, whether couched in due process terms or in terms of the court's supervisory powers over grand jury proceedings, the special circumstances of this case require that the defendant's grand jury testimony be suppressed and this indictment dismissed.[11]

Accordingly, the indictment is hereby ordered dismissed.

So Ordered.

[11] This indictment charges the defendant only with testifying falsely before the grand jury. Suppression of that testimony necessitates its dismissal, there having been no representation by the Government as to an independent basis for indictment.

(s) J. L. TAURO
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal 74-72-T
UNITED STATES OF AMERICA
v.
ROBERT CHEVOOR

ORDER OF DISMISSAL
March 21, 1975

TAURO, *D.J.*

In accordance wth the Opinion and Order entered on March 21, 1975,

IT IS ORDERED:

That the Indictment be, and the same is hereby Dismissed.

(s) J. L. TAURO
United States District Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 75-1144

UNITED STATES OF AMERICA,
APPELLANT,
v.
ROBERT CHEVOOR,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. JOSEPH L. TAURO, *U. S. District Judge*)
[392 F. Supp. 436]

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*, THOMSEN,*
Senior District Judge.

James A. Hunolt, Attorney, United States Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Martin D. Boudreau*, Special Attorney, United States Department of Justice, and *Shirley Baccus-Lobel*, Attorney, United States Department of Justice, were on brief, for appellant.

Jeffrey M. Smith, with whom *Paul T. Smith* and *Harvey R. Peters* were on brief, for appellee.

December 3, 1975

COFFIN, *Chief Judge*. Robert Chevoor was indicted under 18 U.S.C. § 1623 for knowingly making false declarations to a federal grand jury. The district court, finding fundamental unfairness in the totality of the circumstances surrounding Chevoor's grand jury appearance, suppressed the

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* Of the District of Maryland, sitting by designation.

grand jury transcript and dismissed the indictment. 392 F. Supp. 436 (D. Mass. 1975).

In January, 1973, an intensive government investigation was launched into alleged gambling and loansharking by one Michael Pellicci activities for which he was subsequently indicted. This effort involved the use of undercover agents and of court-authorized intercceptions of wire and oral communications. From these sources, the government obtained evidence which indicated that Chevoor was a victim of Pellicci's loansharking, owed Pellicci, $7,000, was being pressed to do political favors for Pellicci, and also was involved in the repayment by a third party of a larger loan to Pellicci. Particularly damning in the government's view was an intercepted December 9, 1973 conversation between Pellicci and Chevoor in which "payments" by the alleged third party were discussed.

On the evening of January 8, 1974, two F.B.I. agents went to Chevoor's house to serve upon him a subpoena calling for his appearance before the grand jury on January 9. Prior to serving the subpoena, agent Vaules told Chevoor that he was not a grand jury target, but that the grand jury was investigating Pellicci, and he asked Chevoor a number of questions about his association with Pellicci, including whether Chevoor owed Pellicci money or knew about others who did. Chevoor answered these questions in the negative. The district court subsequently found that his responses were clearly inconsistent with the transcript of the December 9 intercepted conversation. The district court also found that during the course of this meeting, the F.B.I. agent told Chevoor that he "had to testify", or at least "had to appear", before the grand jury.

The subpoena (and the agent) directed to Chevoor to report the next morning to Strike Force attorney Friedman in connection with his grand jury appearance. Friedman told Chevoor that the grand jury was investigating Pellicci's

loansharking, and that Chevoor was not a target, but that he could expect to be prosecuted if he gave false testimony before the grand jury. Then, with a transcript of the December 9 conversation before him (not identified as such to Chevoor), Friedman questioned Chevoor about whether he had ever borrowed money from Pellicci, whether he owed money to Pellicci, whether he knew others who did, and whether he had ever discussed with Pellicci repayments of such loans. Chevoor again responded negatively. Friedman said he knew Chevoor was not cooperating and not telling the truth; Chevoor asked in what respects this was so. Vaules (who was there throughout this interview) interrupted: "We are not going to tell you what we have on you." Despite this pressure, Chevoor did not change his story. The district court found that on the way to the grand jury room, Friedman told Chevoor that he "just got six or seven guys like you for perjury" in New York or New Jersey.

Before the grand jury, the same questions, among others, were asked, and the same negative responses given by Chevoor. His later indictments were for material false statements with respect to whether Chevoor had ever owed money to Pellicci; whether he had ever discussed with Pellicci payments due to the latter; and whether he had ever discussed with Pellicci the fact that other individuals owed Pellicci money.

The district court found as a fact that during the January 9 office conversation, neither Friedman nor Vaules informed Chevoor that the December 9 conversation had been intercepted,[1] that the questioning was based on that conversation, or that the answers given both on the 8th and the 9th conflicted specifically with it. The district court

[1] The judge who authorized the intercept had previously determined that the government need not disclose the existence of the wiretap to Chevoor. 18 U.S.C. § 2518(8)(d).

also found that on January 9, Chevoor was not given *Miranda* warnings or told of any of his rights under the Fifth and Sixth Amendments. At the time of his appearance, Chevoor was a 40 year old school teacher and real estate broker, and a member of the Watertown Redevelopment Authority. He had a B.A. in business administration and had recently received a Master's degree in Education. He was not accompanied by a lawyer.

The district court's assessment of this case relied heavily upon the existence of 18 U.S.C. § 1001, which makes it a crime to make false statements in matters within the jurisdiction of federal departments or agencies.[2] The court felt that Chevoor's responses prior to entering the grand jury room, first on January 8 to the F.B.I. agents, then on January 9 to Vaules and Friedman, had violated this statute.[3] These violations, in the opinion of the district court, made government assurance to Chevoor that "he was not a target" at least misleading. "Both [Friedman] and Vaules knew, or should have known, that the defendant was subject to possible indictment for having made false statements to a federal officer." 392 F. Supp. at 440.

The district court, moreover, found that Chevoor was a target in another sense. "[I]t would have been unrealistic

[2] 18 U.S.C. § 1001 reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[3] It is worth noting that the government did not choose to vigorously contest Chevoor's assertion that he had violated § 1001. In its brief before this court, the government only went so far as to indicate that "it is not entirely clear" that § 1001 covered the facts of this case.

for Vaules and Friedman to assume that defendant would do anything but give the same, apparently untruthful, answers before the grand jury." *Id.* Although Pellicci was their primary interest and the subpoena originally was issued to Chevoor as a witness in the investigation of Pellicci, the "prime purpose of putting him on the [grand jury] stand", in light of the intervening denials, was, in the view of the district court, to obtain a perjury indictment. *Id.* at 442.

Putting these two factors together, the district court saw Chevoor as being on the horns of a dilemma. The government had put him into a situation where his choices were to tell the truth, which would provide evidence against him under a subsequent § 1001 indictment, or to lie, which would open him up to an indictment for perjury. In this connection, the agent's indication the night before that Chevoor "had to testify", coupled with the absence of warnings as to his rights, foreclosed to Chevoor his third option, the one which should have been afforded to him explicitly: his right to take the Fifth Amendment.

The court found that the totality of the circumstances made Chevoor a "potential, if not probable" and a "likely, if not inevitable" grand jury target.[4] As such, the court reasoned, Chevoor should have been told of his right to remain silent. While recognizing that the failure to give such a warning is ordinarily no license for perjury, the court cited "unique and compelling circumstances" which in this case warranted such a result: (1) the unknown interception; (2) the two statements inconsistent with that conversation; (3) the government assurances that Chevoor was not a target; and (4) the summons without warnings for the purpose of asking the same questions.[4] These factors

[4] The compelling nature of these circumstances, of course, depends upon the underlying finding that the inconsistent statements were violations of § 1001.

added up to a situation where the government "turned the screw too tightly" and violated Chevoor's right not to be "ensnared"; the resulting fundamental unfairness justified suppression of grand jury testimony under the due process clause of the Fifth Amendment and the court's supervisory powers; and the indictment was dismissed because without the grand jury testimony there was no evidence of perjury. Were we to accept all of the premises assumed by the district court — i.e., the government's placing of a witness in a situation where criminal prosecution would follow whether he lied or told the truth — we might well be of the same mind. Our difference stems from our non-acceptance of one of the premises.

The district court saw Chevoor in the position of a grand jury witness whose testimony was so likely to be incriminating that the jury could be said to have the objective of using him as a target for ultimate prosecution rather than as an instrument for investigating the criminality of another. The general rule, of course, is that a prospective witness such as was Chevoor when he was subpoenaed[5] is entitled to no warnings of constitutional rights. *United States* v. *DiMichele*, 375 F.2d 959 (3d Cir.), *cert. denied*, 389 U.S. 838 (1967). Even if the prosecution and the grand jury fully expect that the witness will perjure himself, there is no obligation to give protective warnings.[6] Absent other pressures, a witness is expected to tell the truth. The privilege against self-incrimination bars compelled testimony as to past crimes; it does not shelter new perjury.[7]

[5] It is not argued that Chevoor was a possible defendant on any substantive offense.

[6] We discuss, *infra*, Chevoor's claim that the sole purpose of the government being to ensnare him in the commission of perjury, this constituted impermissible prosecutorial conduct.

[7] *United States* v. *Knox*, 396 U.S. 77 (1969); *Glickstein* v. *United States*, 222 U.S. 139 (1911); *United States* v. *Pommerening*, 500 F.2d 92, 99-100 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *Robinson* v. *United States*, 401 F.2d 248 (9th Cir. 1968); *United States* v. *DiGiovanni*, 397 F.2d 409, 412 (7th Cir.), *cert. denied*, 303 U.S. 924 (1968); *United States* v. *Parker*, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957); *United States* v. *Rosen*, 353 F.2d 523 (2d Cir. 1965), *cert. denied*, 389 U.S. 838 (1966); *United States* v. *Winter*, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 908 (1965) (Sixth Amendment); *United States* v. *Orta*, 253 F.2d 312 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958); *United States* v. *Andrews*, 370 F. Supp. 365, 370-71 (D. Conn. 1974); *United States* v. *McGinnis*, 344 F. Supp. 89 (S. D. Tex. 1972); *cf. United States* v. *Remington*, 208 F.2d 567 (2d Cir. 1953), *cert. denied*, 347 U.S. 913 (1954) (grand jury misconduct does not excuse perjury on trial of subsequent indictments).

This principle has even been applied in a number of recent cases holding that the existence of a penalty, later declared unconstitutional, upon the exercise of the Fifth Amendment privilege, does not excuse perjury: *United States* v. *Nickels*, 502 F.2d 1173 (7th Cir. 1974), *petition for cert. filed*, No. 74-735 (Dec. 11, 1974); *United States* v. *Pacente*, 503 F.2d 543, 548-49 (7th Cir.) (*en banc*), *cert. denied*, 419 U.S. 1048 (1974); *United States* v. *Devitt*, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *United States ex rel. Annunziato* v. *Deegan*, 440 F.2d 92 (2d Cir. 1971).

[8] *United States* v. *Mandujano*, 496 F.2d 1050 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975) ("putative" defendant); *United States* v. *Wong*, No. 74-1636 (9th Cir., Sept. 23, 1974), *petition for cert. filed*, No. 74-635 (Nov. 22, 1974) ("prospective" defendant); *United States* v. *Kreps*, 349 F. Supp. 1049 (W.D. Wisc. 1972) (accusatory proceedings); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio 1968) (virtual defendant); *United States* v. *DiGrazia*, 213 F. Supp. 232 (N.D. Ill. 1963) (should warn on remote possibility); *see United States* v. *Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955) (fairness seems to require warnings for *de jure* or *de facto* defendants—but mere possibility of later indictment not enough); *United States* v. *Parker*, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957) (same); *see also United States* v. *Luxenberg*, 374 F.2d 241, 246 (6th Cir. 1967) (dictum).

Of these cases, only *Mandujano* and *Wong* have extended to the warning requirement the remedy suppressing perjury; in both cases the procedure of calling the "witness" without giving effective warnings was found to be fundamentally unfair, because prior to calling them the prosecutors had focussed in on them with strong evidence that they were guilty of an underlying substantive offense.

When a grand jury witness is knowingly put in the position, if he testifies at all, of either perjuring himself or incriminating himself, a number of courts have recently held that he should be given *Miranda* warnings or at least the advice that he may remain silent as to incriminating matters—the position taken by the district court.[8] We have

considerable sympathy with this approach. While there is not the isolated and unobservable stationhouse custody which underlies the holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the conjunction of an assembled grand jury, a vigorous prosecutor, and ex parte proceedings conducted in the absence of a lawyer counselling the witness gives rise to a kind of coerciveness suggesting the wisdom of giving at least notice that a witness need not testify if such would incriminate him.

We need not, however, presently face the questions whether, when, and what warnings should be given "target" grand jury witnesses, for Chevoor was not placed in a situation where his only "safe harbor", to use the phrase of *United States* v. *Mandujano*, 496 F.2d 1050, 1058 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975), was a recourse to silence of which he had not been told. Although he claims to have been thrust upon the horns of, as Wigmore put it, a triceratops, 8 J. Wigmore, Evidence, § 2251 at 316 (McNaughton rev. 1961) — facing perjury, self-incrimination, or contempt—we find no such beast here.

We have concluded that Chevoor faced only the alternatives of perjury or telling the truth. Self-incrimination was not a foreseeable possibility and, therefore, there was no right to remain silent as to which he should have been warned. For he was not liable for prosecution under 18 U.S.C. § 1001 when he entered the grand jury room. Instead, his responses to Vaules' and Friedman's questioning fall within the "exculpatory no" category of responses which are outside the scope of "statements" within the meaning of the statute.

The statute from which § 1001 evolved originally prohibited false claims against the government and the use of false statements in support of such fraudulent claims. Act of March 2, 1863, 12 Stat. 696. In 1934, an amendment broadened the statute by dropping the restriction to pecuni-

ary or proprietary loss to the United States. Act of June 18, 1934, 48 Stat. 996. This was meant primarily to protect the newly created federal regulatory agencies against fraudulent practices. The Supreme Court described the added scope as follows: "The amendment indicated congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941). The false claims section has since been split from the fraudulent statements section, Act of June 25, 1948, 62 Stat. 749, but none of the minor changes since 1934 have affected the substance of the statute, *United States* v. *Bramblett*, 348 U.S. 503 (1955).

Under *Gilliland* and *Bramblett*, the provision has a very broad scope. But in *Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967), the court found that most prosecutions fell into four categories: (1) giving false information with the purpose of receiving a monetary or proprietary benefit, *e.g.*, *Bramblett*, *supra*; (2) resisting monetary claims by the United States through the presentation of false information, *e.g.*, *United States* v. *Knox*, 396 U.S. 77 (1969); (3) seeking some governmental privilege such as employment or security clearance on the basis of falsified information, *e.g.*, *United States* v. *Marzani*, 168 F.2d 133 (D.C. Cir.), *aff'd by an equally divided court*, 335 U.S. 895 (1948); and (4) giving false information to frustrate lawful regulation, *e.g.*, *Gilliland*, *supra*.

The courts have had difficulty in affirming coverage of F.B.I. investigations. Although differing rationales have been used, there is widespread agreement that mere negative responses to government initiated inquiries should not be included in the statutory proscription. Such utterances fall within neither of the dual categories of false statement intended, according to *Gilliland* and *Bramblett*, to be cov-

ered by the statute: those in support of fraudulent claims, and those tending to pervert the authorized functions of departments and agencies. Moreover, to allow § 1001 to cover such statements would undermine the safeguards that are normally provided in perjury prosecutions, primarily the formality of the oath, while permitting sanctions as great as those under perjury statutes.

Cases involving the F.B.I. or U. S. Attorney initiating the questioning[9] have uniformly held the statute not to cover the responses, although not always by the same rationale.[10] The harder question, which is not involved in

[9] Tax fraud investigations would appear to be closer to what the statute was intended to cover than are F.B.I. investigations, because underlying any tax inquiry is the question of monetary loss to the government. However, the "exculpatory no" exception to § 1001 has been applied in this field as well. *United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974) (sworn affidavit in response to I.R.S. investigation); *Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962) (I.R.S. inquiry into income from bribes; negative responses under oath); *United States* v. *Philippe*, 173 F. Supp. 582 (S.D. N.Y. 1959) (oral denials under oath). In cases to the contrary, an affirmative statement usually is the basis for the charge. *United States* v. *Isaacs*, 493 F.2d 1124, 1158 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (positive and affirmative statements); *United States* v. *Protch*, 481 F.2d 647 (3d Cir. 1973) (sworn affidavit); *United States* v. *Ratner*, 464 F.2d 101 (9th Cir. 1972) (more than mere exculpatory denials); *United States* v. *McCue*, 301 F.2d 452 (2d Cir.), *cert. denied* 379 U.S. 939 (1962) (false story under oath); *Brandow* v. *United States*, 268 F.2d 559 (9th Cir. 1959) (sworn affidavit); *Knowles* v. *United States*, 224 F.2d 168 (10th Cir. 1955); and *Cohen* v. *United States*, 201 F.2d 386 (9th Cir.), *cert. denied*, 345 U.S. 951 (1951) (false net worth statements).

[10] *United States* v. *Bedord*, 455 F.2d 1109 (9th Cir. 1972) (F.B.I. agent trying to serve subpoena asked defendant if he was Bedord; he said he was not); *United States* v. *Ehrlichman*, 379 F. Supp. 291 (D. D.C. 1974) (voluntary statement without oath or transcript during extremely informal interview initiated by F.B.I. in course of criminal investigation); *United States* v. *Davey*, 155 F. Supp. 175 (S.D. N.Y. 1957) (exculpatory denial without oath in informal interview did not pervert F.B.I. function, which is to investigate); *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955) (oral denial to F.B.I. investigation under oath; not a claim against the government or an initiative to induce improper action by the government); *United States* v. *Levin*, 133 F. Supp. 88 (D. Colo. 1953) (oral response to F.B.I. without oath; no jurisdiction because no legal obligation to make the statement).

this case, arises when the defendant is indicted for going to the authorities to falsely initiate an investigation against a third party.[11]

This case involves a clear exculpatory denial situation. Chevoor had presented no false claim against the government, nor was this investigation relative to a claim the government might have had against him. The F.B.I. questioned Chevoor in the course of a criminal investigation; he denied involvement in, or knowledge of the criminal activity. The scenario was repeated at the Strike Force office. The defendant here did not initiate anything; he did not even go so far as to fabricate a misleading story in response to the inquiries. He merely gave negative, oral response to the questioning.[12] No oath was given; no transcript taken. The interviews were informal. Under all these circumstances, we hold that Chevoor's responses were not "statements" within the meaning of 18 U.S.C. § 1001. The government quite properly did not charge him under that section; instead, they charged him under a statute carrying

[11] *Compare Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967) (written statement to F.B.I. charging mistreatment by state policeman, outside statute; with dissent) and *United States* v. *Lambert*, 470 F.2d 354 (5th Cir. 1974) (panel opinion) (complaint by private citizen to F.B.I. outside statute) with *United States* v. *Van Valkenburg*, 157 F. Supp. 599 (D. Alas. 1958) (affirmative statement to U.S. Attorney charging third party with crime within statute); *United States* v. *Adler*, 380 F.2d 917 (2d Cir. 1967) (initiation of investigation, within scope); and *United States* v. *Lambert*, 501 F.2d 943 (5th Cir. 1974) (*en banc*) (overruling panel opinion, *supra*, and explicitly distinguishing *Paternostro*, *supra*).

[12] At the hearing on his motion to suppress, Chevoor testified that at the January 8 subpoena serving encounter agent Vaules asked him if he owed money to Pellicci, and that he answered "No". He further testified that on January 9 in Friedman's office, the latter "asked me if I owed [Pellicci] any money; and I said I didn't owe him any money. And he asked me if I had discussed anything about making payments on any—making any loan shark payments, and I said No; or if I knew of anybody else that was making any loan shark payments, and I said No. I didn't." The government testimony was substantially in accord with that version.

with it the safeguards of formality, normally including a transcript, as well as the average citizen's awareness that lying under oath is a crime. Moreover, they provided Chevoor with specific warnings of his possible criminal liability if he lied before the grand jury.

Additionally, there are no facts which would indicate that the government ever considered the possibility of prosecuting Chevoor under § 1001. None of the pressure on Chevoor concerned possible liability for having already lied; it was all directed to the commission of perjury in the grand jury room. Instead of telling Chevoor that he had lied and was therefore in trouble, they told him that they knew he was lying and that he would be in trouble if he continued to do so before the grand jury. The district court found as a fact that neither Friedman nor Vaules told Chevoor of the existence of § 1001 or of the possibility of prosecution for any statements made outside the grand jury room. Indeed, even after the January 8 responses, Friedman assured Chevoor on January 9 that he was not a target. While our analysis does not depend upon self-serving statements of the prosecutor, whether contemporaneous or subsequent, we find nothing in the record to cast doubt on the truthfulness of that assurance. The district court's finding that it was "misleading" depended upon its premise that Chevoor was in fact liable, a premise which we have rejected. And the fact is that Chevoor was not subsequently indicted under that section. If he had been the focus of a § 1001 inquiry during his grand jury appearance, and if he had subsequently been indicted on such a charge, any incriminating testimony he had given to the grand jury might well have been suppressible. But the actual facts of this case do not present a situation where the prosecution called a witness before the grand jury to obtain either perjury or incriminating evidence on an already committed offense.

If the test depends entirely upon a perceived dilemma on the part of the grand jury witness, Chevoor fares no better. At the hearing on the motion to suppress, he testified under the protection of a ruling analogous to that provided for in *Simmons* v. *United States*, 390 U.S. 377 (1968), that "his testimony will not be able to be used for any other purposes". At that hearing Chevoor evidenced no understanding that lying to federal officers was a crime. More telling, he insisted that he had never given false statements to the grand jury, and it is agreed that his statements to the grand jury paralleled the earlier statements to the F.B.I. and the U.S. Attorney. When asked if he had ever told hs lawyer that he had testified falsely and wanted to change his testimony, he responded: "That I had testified falsely? No." And later: "And to my knowledge. I did not say anything that was false."

Not only does this testimony undercut Chevoor's argument that he had violated § 1001; it demolishes his entire case. It was not a triceratops which threatened him. Since he had not lied to a federal officer, he was not guilty of a substantive offense. Any choice to commit perjury was of his own making, not the result of a dilemma created by the government. This course, and the third alternative of risking contempt through silence, confronted Chevoor no more than the average citizen called before the grand jury. Without liability under § 1001, Chevoor was a mere witness, not any sort of a defendant; he therefore had no right to warnings, and the agent's indication that he "had to testify" was entirely accurate.

Chevoor's second line of defense is that the government's sole purpose in calling him before the grand jury was to extract perjury for which to indict him. The facts do not support this argument. Unlike *Brown* v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957), where such a defense was successful, the grand jury here was conducting a legitimate

investigation into crimes which had in fact taken place within its jurisdiction. *See LaRocca* v. *United States*, 337 F.2d 39, 42-43 (8th Cir. 1964); *but cf. United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo. 1963). It is true that the government did not entirely cooperate with Chevoor, but it is not required to do so. It did not ensnare Chevoor into committing perjury: both Vaules the night before and Friedman prior to the grand jury appearance warned Chevoor that they had reason to believe he was lying, and Friedman added that if he committed perjury in the grand jury he could expect to be prosecuted for it. Moreover, it was possible (even though unlikely) that when it came to the crunch of testifying under oath, with a transcript, Chevoor would succumb to the truth. We cannot say that calling Chevoor in these circumstances even in the anticipation that he would perjure himself is beyond the pale of permissible prosecutorial conduct. *See United States* v. *Nickels*, 502 F.2d 1173, 1176 (7th Cir. 1974). Nor does this reach the level of inexcusable instigation condemned in *United States* v. *Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954).

It is obvious that if Chevoor had admitted knowledge of Pellicci's loansharking activities, his testimony could have been a fruitful source of leads for the investigation. It would be anomalous to rule that his criminal intent should be permitted to thwart that investigation. We hold that it was not unfair for the grand jury to question him. Of course, we do not rule on whether Chevoor did in fact perjure himself when responding to those questions; that will be for the jury to decide.

Reversed.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 75-1144

UNITED STATES OF AMERICA,

APPELLANT,

v.

ROBERT CHEVOOR,

DEFENDANT, APPELLEE.

MEMORANDUM AND ORDER
ON PETITION FOR REHEARING

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Entered December 29, 1975

We have carefully reviewed the petition for rehearing and have seen no argument that was not or could not have been made originally, and none which the court had not previously considered. When we view petitioner in his posture as a grand jury witness, looking at both the positions of the prosecutor and that of petitioner, both objectively and subjectively, we conclude that he was not in a predicament calling for a warning of his right to be silent.

The petition for rehearing is denied.

For the Court,
(s) DANA A. GALLUP
Clerk

[cc: Messrs. Hunolt and Smith.]
